

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1826

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT S. SCIOLINO,

Appellant

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.
2. Whether the trial court properly permitted Agent Shea to answer questions about his impressions of certain statements made by appellant.
3. Whether the trial court properly instructed the jury as to the elements of an offense under 26 U.S.C. §7212(a).

STATUTE INVOLVED

Title 26, United States Code, Section 7212(a)
provides:

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, appellant was convicted on one count of an indictment charging him with endeavoring by threat of force to intimidate an employee of the Internal Revenue Service, in violation of 26 U.S.C. §7212(a). He was acquitted on another count charging him with forcibly intimidating the same employee, in violation of 18 U.S.C. §111. Appellant was sentenced to a term of

one year's imprisonment and fined \$3,000; however, he was ordered to serve only three months of the sentence and was placed on probation for the remaining nine months.

The facts adduced at trial showed that in July, 1972, Thomas S. Shea, an employee of the Internal Revenue Service, was directed to examine the books, records, and corporate tax return of appellant's company, Main Chrysler-Plymouth Corporation. On July 24, Agent Shea went to Main Chrysler-Plymouth, introduced himself, and began an audit of the company. On August 1, 1972, the agent, in accordance with standard procedure, asked appellant for the Chrysler Corporation agreement^{1/} and the tax returns of the company's officers (Tr. 21-26).^{2/} On August 7, 1972, Agent Shea was examining some documents in a salesman's cubicle at Main Chrysler-Plymouth when he was startled by a flash. Looking up, he saw appellant, approximately four feet away, holding a Polaroid flash camera (Tr. 27, 106). He asked

1/ In 1969, appellant entered into an agreement with Chrysler Corporation, which owned 100 percent of the stock of Main Chrysler-Plymouth, whereby he agreed to operate Main Chrysler-Plymouth as its general manager with the right to purchase the stock of the corporation from its profits. In 1972, appellant gained control of the corporation and became its president (Tr. 93-95).

2/ "Tr." refers to the transcript of the trial proceedings.

appellant why he had taken a picture of him and appellant replied: "That's for posterity, so I can show it around and say this is the guy" (Tr. 28). When Shea protested that he had not consented to being photographed, appellant responded: "This is my place, I can do anything I wish." Later that day, appellant apologized, blaming his conduct on medication that he was allegedly taking for a stomach disorder. However, the apology did not include an offer of the offending picture, even though the agent again insisted that it had been taken without his consent (Tr. 31-32).

On August 8, 1972, Agent Shea returned to Main Chrysler-Plymouth and again requested to see the Chrysler agreement, which he had not yet seen, as well as other records and documents. Appellant thereupon asked the agent to step into his office. After briefly looking around his office, appellant sat down behind his desk, opened a drawer, and removed a box which he placed on top of the desk. Agent Shea looked down at the box and observed that it was labeled "Smith & Wesson, .38 Chief Special" (Tr. 34). As he looked up, appellant began to discuss the "uncivilized nature of man." He stated that man "delighted in sports, violence and killing," "that man was unpredictable," and that "one never knew what a man might do in a given set of circumstances." He also stated

that "there [was] no telling what he might do if backed into a corner and there was no way out" (Tr. 35). The telephone then rang and the conversation ended. Agent Shea, believing this to be another attempt by appellant to intimidate him, reported the incident to his supervisor (Tr. 35-36).

On August 17, 1972, the agent again requested to see the Chrysler Agreement and appellant again refused. On August 23, 1972, in the company of his brother, William Sciolino, vice-president of Main Chrysler-Plymouth, appellant told Agent Shea that they had investigated him. He then asked why Shea, one of the "top men" at the Internal Revenue Service, was examining them (Tr. 36-38).

During all of this time, appellant repeatedly refused to show the agent the Chrysler Agreement, supplying varied and often inconsistent reasons for his refusal to do so (Tr. 39). In September, 1972, he finally turned over to the agent the requested document (Tr. 55).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant maintains that the evidence did not support his conviction under 26 U.S.C. §7212, insisting that his

"ambiguous" and "nonspecific" conduct did not constitute the requisite threat to a federal employee (Ap. Br. 7).^{3/}

He implies that only "actual physical resistance to arrest, or a direct written or spoken threat of violence" is contemplated by §7212 (Ap. Br. 6).

Appellant relies on United States v. Glover, 321 F. Supp. 595 (E.D. Ark. 1970), for the proposition that an implied threat cannot support a conviction under §7212. This reliance is misplaced. In that case, the accused was charged with having violated 18 U.S.C. §111, which proscribes only "forcible" intimidation. The court there held that an implied threat against two agents of the Federal Bureau of Investigation did not violate the statute because there was no showing that the threat was accompanied by "force." In contrast, the offense charged in the instant case constitutes a violation of 18 U.S.C. §7212, which requires only that a threat be made.

Appellant's narrow construction of §7212 is without foundation. The legislative history of the statute indicates the clear intention that it be construed more broadly than 18 U.S.C. §111 in order to cover all "threats and threatening acts" against government employees engaged in the performance of their official duties. Internal

^{3/}"Ap. Br." refers to appellant's brief.

Revenue Code of 1954, Report of the Committee on Ways and Means, H.R. Rept. No. 1337, 83rd Cong., 2d Sess. A 427.

This broad construction is further supported by the plain language of the Act, supra at p. 2, and existing case law, United States v. Johnson, 462 F.2d 423, 428 (3rd Cir. 1972), cert. den., 410 U.S. 937.

The harm addressed by §7212 and other federal statutes dealing with threats is no less great where the threat is subtly conveyed. Since it would be unreasonable to permit one to escape the logical and intended import of his conduct because his manner was cunning, the courts have recognized that such statutes reach implicit as well as explicit threats.^{4/}

The evidence adduced at trial clearly supports the jury's finding that appellant's conduct was intended

^{4/}Federal statutes proscribing threats transmitted in interstate commerce (18 U.S.C. §875(c)), United States v. Pennell, 144 F. Supp. 312, 319 (N.D. Cal. 1956); threats affecting interstate commerce (18 U.S.C. §1951), Hulahan v. United States, 214 F.2d 441 (8th Cir. 1954), cert. den., 348 U.S. 856; threats sent by mail (18 U.S.C. §876), United States v. Prochaska, 222 F.2d 1 (7th Cir. 1955), cert. den., 330 U.S. 836; or threats by a labor organization affecting interstate commerce (28 U.S.C. §158(b)), National Labor Relations Board v. Local 254, Building Service Employee International Union, AFL-CIO, 359 F.2d 289, 291 (1st Cir. 1966), have been held to encompass implied as well as direct threats. Indeed, in the latter case, the court recognized that words in themselves innocent can constitute an unlawful threat in the appropriate context.

to threaten and intimidate Agent Shea. Appellant photographed the agent, declaring that he would show the picture around. The intended and obvious suggestion, particularly when this incident is viewed in the context of appellant's subsequent conduct, was that Shea was a "marked man." Appellant later apologized, but only after it became apparent that this tactic had not worked. He did not, however, offer to relinquish the photograph.

Understandably, the jury did not find persuasive appellant's testimony that he was actually taking a picture of a crack on the wall behind Agent Shea. It is inconsistent with his earlier story of a stomach disorder and his failure to explain why he did not forewarn the agent that he was taking a picture or ask him to step out of the way, or explain his purpose to the agent. Although he testified that he had taken "four or five" pictures of the crack that afternoon (Tr. 107), appellant did not produce any of these pictures, nor did he even present evidence that a crack did, in fact, exist.

In August, 1972, appellant once again clearly threatened and attempted to intimidate Agent Shea. The agent requested to see the Chrysler Agreement, whereupon appellant asked him to step into his office. After pretending to search for the agreement, appellant took from

his desk drawer a box labeled "Smith & Wesson, .38 Chief Special," and placed it in plain view of the agent. When Shea looked at the box, appellant began to talk about the uncivilized and unpredictable nature of man and that "one never knew what a man might do in a given set of circumstances." He also stated that "there [was] no telling what he might do if backed into a corner and there was no way out"^{5/} (Tr. 35). As the agent testified, this was another attempt by appellant to threaten and intimidate him (Tr. 35); indeed, Agent Shea subsequently reported the incident to his supervisor (Tr. 36). The jury could, therefore, find that appellant had threatened the agent in violation of 26 U.S.C. §7212(a).

^{5/}After defense counsel read to him portions of his grand jury testimony, Agent Shea agreed that he had told the grand jury that appellant had said, inter alia, that "Man is a basically uncivilized person" and that "I don't know what you would do or what anyone would if you were backed into a corner" (Tr. 73-74). This earlier version of appellant's words differs from his trial testimony only in that the agent stated there that appellant used the word "you" instead of "I" in pressing his point about the unpredictable and uncivilized nature of man. The agent did not, however, repudiate his trial testimony. Indeed, defense counsel did not pursue this point, recognizing that there was no significant difference between the two versions. The jury could reasonably find a threat in either statement.

THE TRIAL COURT PROPERLY PERMITTED AGENT SHEA TO ANSWER QUESTIONS ABOUT HIS IMPRESSIONS OF CERTAIN STATEMENTS MADE BY APPELLANT.

Appellant contends that the Court improperly permitted Agent Shea to testify about his impressions of certain threatening statements made by appellant. He claims that the agent should not have been permitted to answer questions as to what he thought appellant meant by the statement that he was taking the agent's picture "for posterity"^{6/} and by the assertion, after producing the gun box, that he did not know what he would do if he was cornered and there was no escape^{7/} (Tr. 28, 35).

This inquiry was neither "immaterial" nor "extremely prejudicial" (Ap. Br. 10). On the contrary, the agent's reaction to appellant's comments was relevant to the question whether appellant's conduct in the context of surrounding circumstances could be reasonably construed to be an "unlawful threat." The victim's reaction, particularly

^{6/}To this question, the agent replied that he thought appellant meant "future generations" by his reference to posterity" (Tr. 28).

^{7/}Agent Shea stated that he felt that this latter statement was part of "another attempt to intimidate" him and "possibly even a threat" (Tr. 35-36).

where, as here, a threat is implicitly conveyed, is significant because a recital of the words spoken is but one consideration. The perpetrator's tone, gestures and general demeanor are more elusive, but no less relevant, factors and the victim's reaction may be a measure of these factors. Such evidence has been routinely admitted to determine whether a federal employee was "forcibly intimidated" under 18 U.S.C. §111, Gornick v. United States, 320 F.2d 325 (10th Cir. 1963); Galvan v. United States, 318 F.2d 711 (9th Cir. 1963), and to determine whether property was extorted by threat of force under 18 U.S.C. §1951. United States v. DeMasi, 445 F.2d 251 (2nd Cir. 1971), cert. den., 379 U.S. 1021; United States v. Tropiano, 418 F.2d 1069 (2nd Cir. 1969), cert. den., 404 U.S. 882. Moreover, after fully presenting his own impressions of his conduct to the jury (Tr. 106-108, 113-117), appellant cannot argue that it was improper for his victim to have offered a contrary view of this conduct.^{8/} In addition, the court carefully instructed the jury that it must find that

^{8/}Appellant does not contend that he testified with respect to his intent solely because Agent Shea testified as to his reaction to appellant's conduct. Any such contention would most reasonably appear to be an after-the-fact, self-serving rationalization.

appellant aroused a "reasonable fear of bodily harm" to convict under 18 U.S.C. §111 or 26 U.S.C. §7212 (Tr. 232, 234). This standard of reasonableness is sufficient to preclude the likelihood of conviction where the victim interprets conduct to constitute a threat when, in fact, the circumstances are insufficient to justify that reaction in a reasonable person. Here, however, the agent's reaction was simply consistent with the objective circumstances, which amply supported the jury's conclusion that appellant's conduct constituted an implicit threat of force intended to intimidate Agent Shea.

III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF AN OFFENSE UNDER 26 U.S.C. §7212(a).

Appellant contends that the trial court erroneously instructed the jury that it did not have to find "an apparent present ability to carry out the threat by inflicting bodily harm"⁹ to convict under 26 U.S.C. §7212(a) (Tr. 234). There is, however, no authority for this contention.

9/The court instructed the jury that:

This law prohibits interference with the performance of a duty by threat of force. It differs from the law which applies to Count I which, in addition to a threat of force, also requires an apparent present ability to carry out the threat by inflicting (footnote con't on next page)

The court's instructions as to the elements of a §7212(a) violation were proper. "An apparent ability to carry out a threat" is required by §111, but not §7212(a). The former proscribes only acts which "forcibly" intimidate federal officers, while the latter proscribes threats in general. United States v. Johnson, supra; United States v. Bamburger, 432 F.2d 69 (2nd Cir. 1971), cert. den., 405 U.S. 1043. As the court in United States v. Johnson, supra, 462 F.2d at 428, noted:

. . . the type of conduct prohibited by section 111 of Title 18 occupies a much more restricted area than that encompassed by 26 U.S.C. §7212(a). The latter statute prohibits interference with the performance of a duty by "threats of force." 18 U.S.C. §111 on the other hand requires an ability to inflict harm, not merely interference with the performance of a duty. Long v. United States, 199 F.2d 717 (4th Cir. 1972).

Moreover, the argument advanced by appellant would render the enactment of §7212(a), superfluous by limiting, in effect, its scope to the prescriptions of §111.

9/(footnote con't)

immediate bodily harm, but there is no such second requirement as to the crime charged in Count II. Here the crime is by threat of force, prohibit interference with the performance of a duty by threat of force (Tr. 234).

CONCLUSION

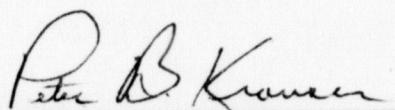
It is, therefore, respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief for Appellee were mailed August 16, 1974 to counsel for appellant Parrino and Cooper, 778 Ellicott Square Building, Buffalo, New York 14203.


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